

( **FEDERAL MARITIME COMMISSION** )  
( **SERVED MAY 18, 1995** )  
( **EXCEPTIONS DUE 6-9-95** )  
( **REPLIES TO EXCEPTIONS DUE 7-3-94** )

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 1787(F)**

**STAUFFER CHEMICAL EUROPE S.A.  
SUBSIDIARY OF ZENECA SPECIALTIES  
(FORMERLY ICI AMERICAS, INC.)**

**v.**

**NYK LINE**

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Practitioner found to have had authority to file complaint on behalf of shipper. Shipment found to have consisted of a larvicide, and was entitled to the lower rate applying on herbicides, fungicides and insecticides, when two descriptions and tariffs are equally appropriate. Complainant found overcharged. Reparation with interest awarded.

*David L. Weiser* for complainant.

*Paul M. Keane* for respondent.

**INITIAL DECISION<sup>1</sup> OF CHARLES E. MORGAN,  
ADMINISTRATIVE LAW JUDGE**

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<sup>1</sup>This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

The complainant originally asked that this complaint be handled under the informal procedure. But, the respondent declined, and the matter was set for formal handling, including the possibility of the filing of exceptions.

The complainant alleges that it was overcharged on a shipment from Los Angeles, California to Moji, Japan, on a ship which sailed February 7, 1992. The informal complaint was served on November 30, 1994. The total amount of the alleged overcharge is \$8,501.55, based on the total of freight charges paid of \$20,292.45 (at the rate of \$3,995.00 per 40-foot container plus surcharges) versus the sought total charges of \$11,790.90 per 40-foot container (at the sought rate of \$2,150.00 per 40-foot container plus surcharges). The complainant seeks that overcharges of \$8,501.55 plus interest be awarded.

One of the original contentions of respondent in its answer to the complaint was that Mr. David L. Weiser failed to prove that he had the requisite authority to bring this complaint, in that he was authorized to act on behalf of Zeneca, Inc., which was not a party to this action.

Mr. Weiser received his practitioner's license No. 980 from the Commission, as per the Secretary's records, in November 1976. The bill of lading showed Stauffer Chemical Europe S.A. as the shipper and ICI Japan Ltd. as the consignee, and the shipment as consisting of a total of 204 drums, in three 40-foot house-to-house containers, of organic chemicals aliphatic and/or aromatic components.

Mr. Weiser, on oath, deposes that he is an agent for the complainant, Stauffer Chemical Europe, S.A., a subsidiary of Zeneca Specialties (formerly ICI Americas). Also

of record is a certification from the Secretary of State of Delaware, that effective December 22, 1992, ICI Americas, Inc., changed its name to Zeneca Inc.

The principal questions in this proceeding relate to what commodities were shipped, and to the appropriate ocean freight rates thereon.

Respondent points out that nothing in the bill of lading indicated that the shipment was to be used as larvicide or insecticide; and that if the shipper was the manufacturer of the goods shipped, the description in the bill of lading may not be ignored. Also respondent argues that the final application of a product with several possible end uses is immaterial to the proper classification of commodities for tariff purposes; and that the applicable freight rate should depend upon the intrinsic nature and market value of the goods.

Furthermore respondent avers that it had no knowledge, nor was it informed by complainant that the shipment of phenyl mercaptan was to be used as a larvicide, or was being shipped as insecticide. Not the purchase order from Stauffer Chemical (Europe) S.A., to ICI Japan Limited, not the invoice from Stauffer to Nihon Bayer Agrochem K.K., and not the invoice from ICI Americas to Stauffer, provided any proof that the goods were to be used as larvicide or insecticide.

The complainant states that this shipment of thiophenol was described on the ocean bill of lading as Phenyl Mercaptan, Organic Chemicals, Aliphatic and/or Aromatic Compounds.

The chemical dictionary of record shows a definition of Thiophenol as another name for Phenyl Mercaptan, with the "Use: Chemical intermediate; mosquito larvicide." The other dictionary definition showed Thiophenol (phenyl mercaptan) with the "Uses:

Pharmaceutical syntheses." Both dictionary definitions described the same letter and numbers, of  $C_6H_5SH$ .

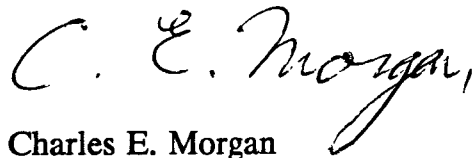
So apparently we have two dictionary definitions of phenyl mercaptan with different uses.

The Federal Maritime Commission has held that, notwithstanding the dictionary description in the bill of lading, what actually moves, as shown by all of the evidence determines the applicable rate. *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, Informal Docket No. 283(I), May 4, 1972, 13 SRR 16 (1972).

It has been decided by the Supreme Court that where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates. *United States v. Gulf Refining Company*, 268 U.S. 542, 546 (1925). Therein a rate on unrefined naphtha was used on a product which was sent to market not to be used as gasoline.

In the present proceeding the respondent was not aware that there were two conflicting rates on the goods shipped, and the respondent had no reason to charge the lower rate. Nevertheless, the complainant is entitled to show what goods actually were shipped, and its proof makes it reasonably apparent that the complainant was entitled to the lower rate where there were two equally appropriate tariff descriptions.

It is concluded and found that the complainant was entitled to the lower rate applying on herbicides, fungicides, and insecticides. The complainant was overcharged, and reparation with interest is awarded.

A handwritten signature in cursive script, reading "C. E. Morgan," is positioned above the printed name.

Charles E. Morgan  
Administrative Law Judge

Washington, D.C.  
May 17, 1995